IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 05-CV-00329-TCK-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION TO COMPEL SIMMONS FOODS, INC. TO RESPOND TO ITS MAY 30, 2006 SET OF REQUESTS FOR PRODUCTION

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), and for its Reply Memorandum in further support of its Motion to Compel Simmons Foods, Inc. to Respond to its May 30, 2006 Set of Requests for Production [DKT #894] states as follows:

1. The State's discovery requests are relevant to Simmons Foods, Inc.'s ("Simmons") knowledge of the environmental hazards of its business operations, to its conduct in disposing of or releasing the waste generated by its birds, to its relationship with its contract growers, and other aspects of the way it conducted its business during times pertinent to the present action. Given Simmons' blanket objections to the State's discovery requests, the State obviously has not had the opportunity to review the contents of the materials that would be responsive to the State's discovery requests. However, based upon the subject matter of the *City of Tulsa* case, there is no doubt that a large portion of the requested materials would relate to Simmons' conduct in the Eucha / Spavinaw watershed. Simmons cannot seriously be arguing that its conduct in the Eucha

/ Spavinaw watershed is materially different in nature from its conduct in the Illinois River watershed.[1] Put another way, the nature of Simmons' conduct in the Eucha / Spavinaw watershed is not *sui generis*. Simmons' conduct is a core issue in the State's lawsuit. Accordingly, such materials are directly relevant to the State's allegations concerning issues of, *inter alia*, integrator control, intentionality, awareness, and willful and wantonness, and are plainly discoverable.[2]

2. Simmons has failed to comply with its obligations under Rule 34. Even assuming arguendo that irrelevant materials were covered by the State's discovery requests or that the State's discovery requests were overbroad, Simmons was under an obligation to produce those documents -- of which there are certainly many -- that are relevant. *See* Fed. R. Civ. P. 34 ("If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts"); *Contracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 655, 666 (D. Kan. 1999) ("Despite the overly broad nature of Requests 17 and 19, defendants have the duty to respond to the extent they are not objectionable"); *Daneshvar v. Graphic Technology, Inc.*, 1998 WL 726091, * 3 (D. Kan. Oct. 9, 1998) ("GTI, nevertheless, has the duty to respond to the extent the discovery is not objectionable"); *Mackey v. IBP, Inc.*, 167

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[1] Simmons focuses its argument largely on questions of injury rather than questions of conduct. Obviously, as to conduct issues the product liability case relied upon by the State in its motion -- *Snowden v. Connaught Labs., Inc.*, 137 F.R.D. 325 (D. Kan. 1991) -- is clearly on point. Further, Simmons' statement that "the only similarity [between the *City of Tulsa* lawsuit and the State's lawsuit] is that allegations of excess nutrient loading are made in both cases," *see* Simmons' Response [DKT # 909], p.4, is not at all credible. The State in its Motion, pp. 3-4, set out an extensive list of similarities between the two cases.

[2] Simmons is plainly aware of what issues are relevant to this lawsuit. For Simmons to suggest that the burden was on the State at the meet and confer, without precise knowledge of what is contained within the *City of Tulsa* file, to identify the materials contained within the *City of Tulsa* file that would be relevant turns principles of discovery on their head. Indeed, it is the State's contention, as explained in its Motion, that the *City of Tulsa* materials are all potentially relevant.

F.R.D. 186, 204 (D. Kan. 1996) ("IBP nevertheless must produce responsive documents, to the extent the request is not objectionable").

3. Despite Simmons' futile attempts to paint a picture to the contrary, the State's discovery requests were indeed an honest effort to save all the parties involved time and money. In making its discovery requests, the State believed that it was likely that Simmons had a preassembled set of the requested materials readily available. Apparently the State was correct in its belief. *See* Simmons' Response, p. 6 ("The total discovery materials from the *City of Tulsa* case sought by the State's requests fill in excess of 50 document boxes containing tens of thousands of documents available only in paper form"). Had Simmons simply made this set available for inspection by the State, it would have been the State, not Simmons, that would have borne the burden of sifting through any irrelevant materials -- assuming arguendo that any irrelevant materials were to even exist within the production.[3] Simmons' make-weight arguments of burden are thus unpersuasive.

4. Simmons' attempts to limit the State's discovery requests by a statute of limitations ignores the fact that the statute of limitations under Oklahoma law does not run against the State when it is acting, as is the case here, in its sovereign capacity to enforce a public right. *See State v. Tidmore*, 674 P.2d 14, 15 (Okla. 1983) ("We have long-recognized the general rule that statutes of limitations do not operate against the state when it is acting in its sovereign capacity to enforce a public right") (citations omitted); *Oklahoma City Municipal Improvement Authority v. HTB, Inc.*, 769 P.2d 131, 134 (Okla. 1988) ("From these cases we distill the general

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[3] Simmons' effort to fault the State for requesting the *City of Tulsa* privilege logs is a red-herring. First, as noted above, the State contends the requested materials are all potentially relevant, and thus production of the accompanying privilege log is appropriate. Second, even assuming arguendo that there were some irrelevant materials contained within the *City of Tulsa* production, the State was merely trying to save Simmons the time and expense of having to create a new privilege log.

rule that statutes of limitation shall not bar suit by any government entity acting in its sovereign capacity to vindicate public rights, and that public policy requires that every reasonable presumption favor government immunity from such limitation"). It further ignores the fact that even assuming arguendo that there were an applicable statute of limitations, it is well-established that "[i]n proper circumstances (particularly where such discovery is useful in understanding more recent events) discovery may be allowed about events that occurred at a time when a claim based upon them would be barred by limitations." Wright & Miller, *Federal Practice & Procedure*, § 2009.

5. Simmons' effort to assert a joint defense privilege claim to the State's discovery request pertaining to its joint defense agreement(s) is unavailing since it failed to assert such a claim in its discovery responses. Without waiving this position, the State would not object to an *in camera* review of any such joint defense agreements(s) to determine whether it does in fact contain information protected from discovery and if so, such information can be redacted and the remainder of the agreement(s) can be produced. *See, e.g., Breon v. Coca-Cola Bottling Co. of New England*, 232 F.R.D. 49, 55 (D. Conn. 2005) ("It is not proper to withhold an entire document from discovery on grounds that a portion of it may be privileged. Where a document purportedly contains some privileged information, the unprivileged portions of the document must be produced during discovery. The proper procedure in such instances is to redact the allegedly privileged communication, and produce the redacted document"). For Simmons to contend that discovery of such agreement(s) is irrelevant ignores the fact that, except in certain circumstances (e.g., pursuant to a valid joint defense agreement), the disclosure of attorney-client privileged materials to a third party waives the privilege. The State is entitled to review any joint defense agreement(s) to understand its claimed parameters and to evaluate whether the sharing of

attorney-client privileged materials has been consistent with a legitimate joint defense agreement.

CONCLUSION

For all of the above reasons, the State of Oklahoma respectfully requests the Court to compel Defendant Simmons Foods, Inc. to respond to the State's May 30, 2006 set of requests for production and produce the requested documents forthwith.

Respectfully Submitted,

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